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Abd Razak bin Dalek v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–120 OF 2006
ZAINUN ALI, AHMAD MAAROP AND AZHAR MA'AH JJCA
5 OCTOBER 2009

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Criminal Law — Murder — Defence — Grave and sudden provocation — Test to be applied — Whether nature of injuries inflicted on deceased showed premeditated act — Whether defence of grave and sudden provocation established

D

Criminal Law — Murder — Defence — Non-insane automatism — Whether prosecution proved alleged incapacity — Whether defence of non-insane automatism established

E

Criminal Law — Murder — Defence — Sudden fight — Whether fight proven — Whether appellant acted in cruel or unusual manner — Whether defence of sudden fight established

F

Criminal Law — Penal Code — s 302 — Murder — Appeal — Whether prosecution case established beyond reasonable doubt — Whether identity of deceased and fact of death proven — Whether prosecution must prove fact of pronouncement of death of deceased at scene of murder — Whether type and gravity of injuries inflicted on deceased sufficient in ordinary course of nature to cause death — Whether injuries intentionally caused

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The appellant was charged with the murder of his wife ('deceased'), an offence punishable under s 302 of the Penal Code ('Code'). The deceased was found to have died from a fatal wound to her throat which had been slit. The death occurred in the kitchen of the appellant's sister in law's ('PW8') house. PW8 was present in the immediate vicinity at the time of the incident but did not witness the actus reus. According to PW8, the deceased and the appellant had come to her house on the day of the incident and were arguing. At that material time the deceased was no longer living with the appellant. As PW8 was cooking, the deceased had patted PW8's shoulder and called out PW8's name. When PW8 turned, she saw blood on the deceased and at the kitchen door where the deceased had stood earlier. The deceased could barely walk and subsequently collapsed on the floor. At the same time, PW8 saw blood on the appellant's neck and subsequently saw the appellant hitting his head against the wall. PW8's husband ('PW11') had also witnessed the deceased who was

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covered with blood, staggering in the kitchen. When PW11 tried to seize the knife from the appellant, the appellant stabbed his own neck with it and collapsed to the floor. The appellant put up a defence of sudden grave and provocation. According to the appellant, on the day of the incident, the deceased told him that they were no longer husband and wife and were merely friends. The appellant said he could not accept what was said by the deceased because she was still his wife. The High Court rejected the appellant's defence of grave and sudden provocation. The appellant was convicted and sentenced to death by the High Court. The appellant appealed against that decision on the following grounds: (i) improper identification of the deceased to the forensic pathologist; (ii) the evidence of pronouncement of the deceased's death at the scene was hearsay. It was claimed that after the arrival of the ambulance at PW8's house, she was told by a medical officer that Rozita had died. However, it was contended that PW8's evidence on this issue was hearsay since the medical officer was not called; (iii) the learned trial judge erred in not considering adequately the defence of grave and sudden provocation; (iv) that the appellant was suffering from non-insane automatism at the time of the incident; and (v) that there was a sudden fight.

Held, dismissing the appeal:

(1) The evidence of PW8 and the other prosecution witnesses considered cumulatively, had proven beyond reasonable doubt the identity of Rozita and the fact of her death. There is no legal requirement that the prosecution must prove the fact of the pronouncement of death of the victim at the scene of the alleged murder. So, the non-calling of the medical officer who told PW8 at the scene that Rozita had died was not fatal to the prosecution's case (see paras 12 & 14).

(2) PW8's and PW11's evidence considered cumulatively with the other evidence adduced by the prosecution led only to one conclusion — ie the death of Rozita was caused by, or in consequence of the act of the appellant at the scene and at the time stated in the charge. There was no doubt that the appellant intended to cause the injuries on Rozita's neck. The type and gravity of the incised wound on Rozita's neck was sufficient in the ordinary course of nature to cause her death. The prosecution had made out a prima facie case of murder against the appellant (see para 14).

(3) There was nothing in the evidence to raise a reasonable doubt that the appellant was incapacitated by non-insane automatism. The prosecution had disproved the alleged incapacity of the appellant (non-insane automatism) beyond reasonable doubt. The defence of non-insane automatism therefore failed (see paras 15–16).

(4) The test for determining whether there has been grave and sudden provocation is whether the provocation is sufficient to deprive a reasonable man his self control, and not whether it is sufficient to deprive

the particular accused. The retaliation must commensurate with the degree of provocation by the deceased. The act of the appellant in causing injuries on Rozita's neck was not an act of a person who was deprived of the power of self control by grave and sudden provocation, but a premeditated act. The defence of grave and sudden provocation was not made out (see paras 19, 21 & 26).

(5) There was no evidence to establish a fight (or sudden fight) between the appellant and Rozita. Even if there had been a fight and whatever that Rozita did prior to the attack on her, it was clear beyond reasonable doubt that the appellant had acted in a cruel or unusual manner. The defence of sudden fight also failed (see paras 28–29).

[Bahasa Malaysia summary

Perayu telah dituduh dengan pembunuhan isterinya ('si mati'), kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun'). Si mati didapati mati akibat kecederaan di lehernya yang mana telah dikelar. Kematian tersebut berlaku di dapur rumah kakak ipar perayu ('PW8'). PW8 berada berhampiran tempat kejadian semasa kejadian tersebut tetapi tidak menyaksikan actus reus tersebut. Menurut PW8, si mati dan perayu telah datang ke rumahnya pada hari kejadian tersebut dan sedang bertengkar. Pada masa material, si mati tidak lagi tinggal sebumbung dengan perayu. Semasa PW8 sedang memasak, si mati telah menepuk bahu PW8 dan memanggil nama PW8. Apabila PW8 menoleh, dia nampak darah pada si mati dan di pintu dapur di mana si mati berdiri sebelum itu. Si mati hampir tidak boleh berjalan dan kemudiannya rebah ke lantai. Pada masa yang sama, PW8 nampak darah di leher perayu dan kemudiannya melihat perayu menghantuk-hantukkan kepalanya ke dinding. Suami PW8 ('PW11') juga telah menyaksikan si mati berlumuran darah, terhuyung-hayang di dapur. Apabila PW11 cuba merampas pisau daripada perayu, perayu menikam lehernya dengan pisau tersebut dan rebah ke lantai. Perayu membela diri atas dasar bangkitan marah besar dan mengejut. Menurut perayu, pada hari kejadian tersebut, si mati memberitahunya bahawa mereka bukan lagi suami dan isteri dan hanyalah sekadar kawan. Perayu berkata dia tidak dapat menerima apa yang dinyatakan oleh si mati kerana dia masih lagi isterinya. Mahkamah Tinggi menolak pembelaan bangkitan marah besar dan mengejut perayu. Perayu telah disabit dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Perayu merayu terhadap keputusan tersebut atas alasan-alasan berikut: (i) pengecaman si mati yang tidak betul kepada ahli patologi forensik; (ii) keterangan pengumuman kematian si mati pada tempat kejadian adalah dengar cakap. Adalah didakwa bahawa selepas ketibaan ambulans di rumah PW8, dia telah dimaklumkan oleh seorang pegawai perubatan bahawa Rozita telah meninggal dunia. Walau bagaimanapun, adalah ditegaskan bahawa keterangan PW8 berkaitan isu ini adalah dengar cakap memandangkan pegawai perubatan tersebut tidak dipanggil; (iii) hakim bicara yang bijaksana telah khilaf kerana tidak mempertimbangkan pembelaan

bangkitan marah besar dan mengejut dengan sewajarnya; (iv) bahawa perayu mengalami automatism tidak hilang akal pada masa kejadian tersebut; dan (v) bahawa terdapat pergaduhan mengejut.

Diputuskan, menolak rayuan:

(1) Keterangan PW8 dan saksi-saksi pihak pendakwaan yang lain dipertimbangkan secara kumulatif, membuktikan, melampaui keraguan munasabah, identiti Rozita dan fakta kematiannya. Tidak terdapat kehendak perundangan bahawa pihak pendakwaan perlu membuktikan fakta tentang pengumuman kematian mangsa di tempat kejadian pembunuhan tersebut. Oleh itu, dengan tidak memanggil pegawai perubatan yang telah memberitahu PW8 di tempat kejadian bahawa Rozita telah meninggal dunia tidak memudaratkan kes pihak pendakwaan (lihat perenggan 12 & 14).

(2) Keterangan PW8 dan PW11 yang dipertimbangkan secara kumulatif bersama keterangan lain yang dikemukakan oleh pihak pendakwaan menjurus kepada satu kesimpulan — iaitu kematian Rozita telah disebabkan oleh, atau akibat daripada tindakan perayu di tempat kejadian dan pada masa yang dinyatakan di dalam tuduhan. Tidak terdapat keraguan bahawa perayu berniat untuk menyebabkan kecederaan kepada leher Rozita. Jenis dan keseriusan luka insisi di leher Rozita adalah mencukupi dalam sifat sebab biasa untuk menyebabkan kematiannya. Pihak pendakwaan telah berjaya membuktikan kes pembunuhan prima facie terhadap perayu (lihat perenggan 14).

(3) Tiada apa-apa dalam keterangan untuk menimbulkan keraguan munasabah bahawa perayu telah hilang upaya disebabkan automatism tidak hilang akal. Pihak pendakwaan telah membuktikan sebaliknya kehilangan upaya perayu melampaui keraguan munasabah. Pembelaan automatism tidak hilang akal oleh itu gagal (lihat perenggan 15–16).

(4) Ujian untuk menentukan sama ada terdapat bangkitan marah besar dan mengejut adalah sama ada provokasi adalah mencukupi untuk menyebabkan seorang yang munasabah hilang kawalan dirinya; dan bukan sama ada ianya mencukupi untuk menyebabkan seorang tertuduh hilang kawalan. Tindakan balas hendaklah setimpal dengan tahap provokasi oleh si mati. Tindakan perayu menyebabkan kecederaan kepada leher Rozita bukanlah tindakan seseorang yang hilang kawalan dirinya disebabkan bangkitan marah besar dan mengejut, tetapi adalah tindakan yang telah dirancang. Pembelaan bangkitan marah besar dan mengejut tidak berjaya dibuktikan (lihat perenggan 19, 21 & 26).

(5) Tiada keterangan untuk membuktikan pergaduhan (atau pergaduhan secara tiba-tiba) di antara perayu dan Rozita. Sekiranya terdapat suatu pergaduhan dan apa sahaja yang dilakukan oleh Rozita sebelum serangan

terhadapnya, ianya jelas melampaui keraguan munasabah bahawa perayu telah bertindak dengan cara yang kejam atau luar biasa. Pembelaan pergaduhan secara tiba-tiba juga gagal (lihat perenggan 28–29).]

Notes

For a case on defence against offence of murder, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1157.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Attorney-General for Ceylon v Kumarasinghege Don John Perera [1953] AC 200, HL (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Bratty v Attorney-General for Northern Ireland (1981) 46 Cr App R 1 (refd)

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)

Ghulam Mustafa Gahno v Emperor (1939) 40 Cr LJ 778 (refd)

Ikau Anak Mail v PP [1973] 2 MLJ 153, FC (refd)

King, The v Lesbini [1914] 3 KB 1116 (refd)

Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ 143, SC (refd)

Note; R v Duffy [1949] 1 All ER 932 (refd)

Police v Bannin [1991] 2 NZLR 237, HC (refd)

PP v Awang Raduan Awang Bol [2005] 1 CLJ 649, FC (refd)

PP v Kenneth Fook Mun Lee (No 1) [2002] 2 MLJ 563, HC (refd)

Queen, The v Cottle [1958] NZLR 999, CA (refd)

R v Burgess (1991) 93 Cr App R 41, CA (refd)

R v Hennessy [1989] 2 All ER 9, CA (refd)

Regina v Quick; Regina v Paddison [1973] QB 910, CA (refd)

Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Vijayan v PP [1975] 2 MLJ 8 (refd)

Virsa Singh v The State of Punjab AIR 1958 SC 465, SC (refd)

Legislation referred to

Indian Penal Code [IND] s 300, Exception 1
Evidence Act 1950 ss 105, 114 145 157
Penal Code ss 84, 300, (c), Exceptions 1, 4, 302

Appeal from: Criminal Trial No 45–11 of 2002 (High Court, Muar)

T Vijay (T Vijay & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Ahmad Maarop JCA:

[1] The appellant was charged in the High Court with the murder of his wife, Rozita bt Haron ('Rozita') between 8am–8.30am on 3 September 2001 in unnumbered house in Parit Pecah, Parit Jawa, Muar, Johore, an offence punishable under s 302 of the Penal Code. At the end of the trial the appellant was found guilty, convicted and sentenced to death. He appealed against that decision. Hence, the appeal before us.

THE PROSECUTION'S CASE

[2] The prosecution's case is as follows. According to the evidence of Rokiah bt Dawi ('PW8'), the appellant was the younger brother of her husband, Mohd Yusof bin Dalek ('PW11'). The deceased Rozita was the appellant's wife. The appellant and Rozita had two children, namely Mohd Zainuddin and Mohd Rafiz ('PW10'). The appellant's house was about 10 feet from PW8's house. On 3 September 2001, Rozita was no longer living with the appellant. She left the appellant. Although she was not divorced by the appellant, Rozita had left him sometime in June 2001. Sometime between 7am–8am on 3 September 2001, PW8 informed PW11 that Rozita had come to visit PW10 who was then having fever. PW8 asked Rozita why she (Rozita) did not attend the wedding of her (PW8) child on 2 September 2001. Rozita replied that she could not make it. About 10–15 minutes after Rozita arrived at PW8's house, the appellant came over to PW8's house. At that time PW8 and Rozita were in the kitchen of PW8's house. PW8 then went out to the barn which was outside her house to take some *nasi minyak* for Rozita, after which PW8 re-entered her house. As she was re-entering her house PW8 heard the appellant saying to Rozita, 'abang pegang Ita pun tak boleh ke. Ita kan masih isteri abang'. Ita was Rozita's nickname. At that time the appellant and Rozita were by the side of PW8's kitchen door. No other person was present. PW8 placed the *nasi minyak* on the stove and then went to the toilet outside her house. The appellant and Rozita were still by the side of PW8's kitchen door. When PW8 re-entered the kitchen, the appellant and Rozita were still by the side of the kitchen door. Then, as PW8 was heating up the *nasi minyak*, Rozita came from the rear and patted PW8's right shoulder. Rozita called out PW8's name 'Kak Kiah'. PW8 turned. She felt that her dress was wet. PW8 saw blood on Rozita and at the kitchen door where Rozita had stood earlier. At that time Rozita could still walk. Then Rozita collapsed onto the floor, and was bleeding at the place where she collapsed. According to PW8, when Rozita patted her shoulder, the appellant was beside the kitchen wall. After Rozita collapsed on the floor, PW8 saw blood on the appellant's neck. Then he lost his consciousness. Later, the appellant got up and hit his head against the wall. When he was hitting his head against the wall, the appellant did not say anything. At that time apart from PW8, Rozita

and the appellant, there was no other person in the kitchen. Then, PW11 entered the kitchen. PW11 seized the knife ('P8A') from the appellant. The knife was put on a chair and covered with a towel. PW11 then left to summon an ambulance. Then PW8 saw the appellant hitting his head against the wall again. PW8 shouted to her son (Mohd Yusri) who was in the bedroom to come out to help. Mohd Yusri came out and went to the appellant. Mohd Yusri tried to lift the appellant but the appellant fell onto the floor. Then PW10 entered the kitchen and went over to Rozita. PW10 hugged Rozita and cried. PW8 went to PW10 and calmed him. In the meantime, PW11 arrived back at the kitchen with his nephew (Mohd Nazrul). PW11 and Mohd Nazrul attended to the appellant. PW8 and PW10 remained with Rozita who was then motionless. Later, an ambulance arrived and PW8 was informed by a medical officer that Rozita had died.

[3] According to PW11, at about 8am on 3 September 2001 he was in his house. On the previous day a wedding was held at his house and some cooking pots were left unwashed. So, he went to the *bangsal* by the side of his house and cleaned some of the unwashed pots. PW11 saw PW8 at the *bangsal*. PW8 took some *nasi minyak* from a cooking pot. PW11 asked PW8 who would want to eat *nasi minyak* that early in the morning? PW8 replied that Rozita and the appellant were in their house. PW8 took some *nasi minyak* into the kitchen. PW11 continued with his chores. About 10–15 minutes later, PW11 heard a loud voice of a quarrel inside his house. PW11 paid no attention because he was used to the quarrels between the appellant and Rozita. Five to six minutes later, PW11 heard the voice of Rozita crying out 'Kak Kiah'. PW11 rushed into the kitchen of his house. He saw Rozita, who was then covered with blood, staggering in the kitchen. Then Rozita collapsed onto the floor. At that time the appellant was in the kitchen. The appellant was holding a knife. The appellant pointed the knife at himself. When PW11 tried to seize the knife from the appellant, the appellant stabbed his own neck with it. Then the appellant collapsed onto the floor. The appellant, who was still holding the knife, pointed it at his stomach. PW11 succeeded in seizing the knife from the appellant. PW11 put the knife (P8A) on a chair. PW11 then left to a neighbour's house to call an ambulance. About 1/2 an hour later, an ambulance arrived and the appellant was taken away in the ambulance. The police also arrived. Inspector Rashid ('PW12') took possession of the clothing worn by PW11 on that day which were stained with blood.

[4] At about 8.30am on 3 September 2001, Sjn Sahar bin Abdul Manan ('PW4') who was on duty at the inquiry office at the Parit Jawa police station, received a telephone call from an unidentified member of the public informing him about 'pergaduhan suami isteri di Parit Pecah' and that one person had died and another was injured. PW4 reduced the information into writing vide Parit Jawa Report No 1063/2001 ('P26'). At about 8.37am on the same date,

PW4 informed the officer in charge of the police station, Sjn Ahmad Tajuddin bin Harun ('PW7') about P26. After reading P26, together with Cpl Mokhtar bin Shuib and Cpl Musa bin Muhamad, PW7 proceeded to and arrived at the scene of the incident at Kg Parit Pecah, Parit Jawa, at about 8.50am. There was an ambulance by the side of the road. PW7 entered the house. He saw a body of a woman on the kitchen floor. He also saw a man lying on the floor about 5 feet from the body of the woman. PW7 removed the cloth which was covering the head of the woman. He saw wounds on the neck of the woman. That woman was not breathing. PW7 identified photographs P24 (2, 9 and 10) as the photographs of the woman. PW7 then went closer to the man. The man (identified by PW7 as the appellant), had injuries on his neck and his body was covered with blood. The appellant was alive and a medical officer was attending to him. Later, PW7 allowed the medical officer to take the appellant to the hospital for treatment. PW7 then secured the scene and waited for the investigation officer ('PW12') to arrive. While waiting for PW12, PW7 noticed a blood stained knife (P8A) on a chair in the kitchen. PW12 arrived at the scene at about 10am on 3 September 2001. PW7 briefed PW12 and took him to the kitchen. In the kitchen PW12 saw the body of a woman. PW12 saw blood on the floor near the kitchen door as well as at other places on the kitchen floor. PW12 also found blood on the wall near the kitchen door. PW12 found a knife (P8A) on a chair. He marked the blood stains which he found at the scene with letter 'E1' to 'E7'. He went closer to the body of the woman and saw that there were wounds on the neck. PW12 obtained the particulars of the woman from PW8 and PW11. PW12 directed PW3 to take photographs (P24(1–10)) at the scene. PW12 drew the sketch plan and key (P30 and P30k). He collected specimens of the blood stains which he found at the scene. He took possession of the knife (P8A), a towel and the clothing worn by PW8 and PW11. Then, PW12 directed Cpl Mokhtar bin Shuib to send the body of the woman to Muar Hospital. On 5 September 2001, PW12 attended the post mortem on the woman which was conducted by Dr Shahidan bin Md Noor (PW9) at the Muar Hospital. At the post-mortem PW12 identified the woman as Rozita.

[5] Upon external examination, PW9 found the following wounds on Rozita's body:

(a) Stab wound 2.5cm x 0.5cm and 3.5cm deep on upper right neck (10cm above suprasternal notch and 2.5cm to the right of midline). The wound was directed backwards.

(b) Incised wound on the front of the neck which was nearly horizontal and located 6cm above the suprasternal notch. The wound measured 5.5cm on its upper edge (4cm on the right and 1.5cm on the left) and its lower edge 6cm. It was 2.5cm deep.

Upon internal examination of the body, PW9 found that the lower one-quarter of the thyroid gland was partially severed along with lower one-third of the right sternomastoid muscles. The right common carotid artery was also partially severed at this level. There was marked soft tissue bleeding on the right side from the submandibuler gland above until the bifurcation of the trachea downwards. PW9 certified that the death of Rozita was caused by the incised wound on the front of the neck. PW9 opined that the other wound (the stab wound) was not a fatal wound. It would only have caused soft tissue injury. According to PW9 it was the incised wound which had severed the carotid artery that caused the death of Rozita. Carotid artery was the artery which supplied blood to the brain, and when it was severed, there was massive loss of blood. PW9 opined that death would occur within three minutes. PW9 was also of the view that P8A could be the weapon which caused the stab wound and the incised wound on Rozita.

THE APPELLANT'S CASE

[6] When the defence was called the appellant gave evidence on oath. Four other witnesses also gave evidence for the defence.

[7] The substance of the appellant's evidence is as follows. He had married Rozita about 20 years before he testified in court. At that time Rozita was 16 years old. They had three children. One of their children had passed away. The other two children was Zainuddin and PW10. Rozita frequently changed job. On 3 September 2001, although he had not divorced Rozita, she was no longer living with him. Rozita left their matrimonial home two months before 3 September 2001. She left when he asked her about the high telephone bill that he discovered on 9 June 2001. He asked Rozita about the call made on 14 May 2001 to telephone No 019–7412027 which cost RM22. In reply Rozita said, 'kalau abang telefon nombor ini, Rozita akan ikut lelaki ini lari'. Rozita also told the appellant that she had to attend a three week course in Malacca. At that time she was working as a cleaner in the Muar Hospital. She then left the matrimonial home. The appellant did not believe Rozita. He went to the Muar Hospital and sought clarification from Rozita's work supervisor, Jafri Ismail ('DW2'). DW2 told him that there was no such course. Two or three days after 9 June 2001, the appellant met Rozita at the Muar General Hospital and persuaded her to return home. He was not successful, but according to him he was not angry that Rozita did not want to return home. Two or three days later, he brought PW10 to the Muar Hospital to persuade Rozita to come home. The appellant told Rozita that their son wanted her to come home. Rozita replied that she was busy. Two days after that the appellant went alone to the Muar General Hospital and again persuaded Rozita to come home. In response, Rozita asked him to go to the *kadi*'s office. Rozita asked for a divorce. The appellant did not agree. He left the hospital and then lodged a report with the

kadi that Rozita had not come home since 9 June 2001. Two or three weeks later the appellant was called by the *kadi* to come for counselling. Ustaz Mohamed Hamzan Sayuti ('DW4') counselled him and Rozita. Rozita told the Ustaz that the appellant was a gambler, a drinker and an irresponsible person, all of which according to the appellant was not true. In the presence of the Ustaz, the appellant asked Rozita to come home because he loved her. Rozita did not want to come home. Outside the *kadi*'s office, Rozita told the appellant that she was staying in a rented house in Parit Sakai. About two weeks after the counselling session at the *kadi*'s office, the appellant met Rozita again at Parit Sakai and persuaded her to return home. Rozita still refused to come home. According to the appellant each time Rozita refused to return home he was sad but not angry, 'Tiap-tiap kali Rozita enggan balik saya rasa sedih. Saya tidak rasa marah, sebab tak sampai hati'. Later, there was another occasion when the appellant went to Parit Sakai with PW8 to look for Rozita. He failed to find Rozita there. From Parit Sakai, the appellant went to his father in law's house at Sungai Abong. Rozita was not there. He complained to his father in law. The appellant did not see Rozita until 3 September 2001. During the time when Rozita was away, she was in touch with PW10 through the telephone. According to the appellant during the time Rozita was away from their matrimonial home, he was unsettled. He and PW8 took turn to look after PW10. In his evidence the appellant also related an occasion where when he returned to the house he found PW10 missing from the house. PW8 informed him that she saw PW10 board a bus which was heading for Parit Sakai. The appellant went to Parit Sakai but failed to find PW10 there. He then asked PW8 to help him find PW10. Both of them failed to find PW10. Later, PW8 managed to get in touch with Rozita on the telephone. PW8 informed the appellant that PW10 was with Rozita at the latter's house at Parit Sakai. The appellant asked PW8 to fetch PW10 home. The appellant said he did not go because he was disturbed, '... perasaan saya terganggu fikiran saya tidak senang'. PW8 went to Rozita's house but did not find PW10 there. PW8 returned. According to the appellant when PW10 did not come home he lodged a police report ('D37') on 8 August 2001 that PW10 was in Rozita's house. PW10 returned the following day after the appellant met him and Rozita at the *kadi*'s office. The *kadi* had summoned the appellant to attend counselling. After counselling the appellant took PW10 home. The appellant said that on that occasion before the *kadi*, he also asked Rozita to return home but she refused. Instead, she asked for a divorce. The appellant did not agree. He said he did not want to let her go because he loved her.

[8] Continuing his evidence, the appellant testified that on 3 September 2001 at about 7am his son Zainuddin told him that Rozita was in PW8's house. The appellant said he was happy because he loved Rozita, 'Semasa saya dapat tahu Rozita berada di rumah sebelah saya rasa suka, rasa gembira kerana saya sayang dia'. At that time the appellant was in the hall of his house together with PW10 who was down with fever and was resting there. The appellant

went to PW8's house. He met Rozita in the kitchen of PW8's house, and told her that PW10 was having fever. The appellant asked Rozita to go and see PW10. Rozita kept quiet. The appellant went back to his house feeling sad that Rozita did not want to visit PW10 as requested by him. He told PW10 that Rozita was in PW8's house. However, three or four minutes later, Rozita came over to his house and sat near PW10. Rozita told PW10 that she wanted to take PW10 to eat 'Kentucky'. The appellant told Rozita that he wanted to come along as it had been long since he last met Rozita. Rozita did not welcome the appellant to come along. Rozita said, 'buat segan sahaja'. That saddened the appellant. The appellant also persuaded Rozita to return home, but she said she had rented a house. Thereafter, Rozita went to the kitchen to take her clothing. The appellant followed her to the kitchen. At the kitchen, he repeated his wish of wanting to come along with Rozita and PW10 to eat 'Kentucky'. Rozita again said, 'buat segan sahaja'. The appellant said why should he be ashamed as they were husband and wife, 'saya kata apa segan, sedangkan kita suami isteri'. Rozita kept quiet. Then, the appellant tried to hold and kiss Rozita but she spurned him. This angered the appellant. Rozita did not say why she did not allow him to kiss her. Rozita did not take her clothing. She proceeded to leave the house. When she went down the ladder, the appellant stood near the door. When she reached the ground she appeared to be angry and said, 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja'. The appellant said he did not accept what was said by Rozita because she was still his wife. He said he understood those words by Rozita to mean that there was no more relationship between them. Describing what he felt then and what happened thereafter the appellant said, 'Perasaan saya macam hilang fikiran, dan hilang ingatan. Saya tidak terima hakikat kata Rozita kerana dia masih isteri saya. Saya masuk ke rumah ambil pisau untuk potong dawai bangsal. P8A ini adalah pisau yang saya ambil. Saya ambil pisau itu dari dalam bilik tidur saya. Saya simpannya di dalam bilik tidur saya, sebab takut budak buat main. Saya ambil P8A untuk tujuan memotong dawai bangsal. Dengan pisau, saya turun rumah. Fikiran saya bingung dan hilang ingatan. Dengan pisau saya pergi ke rumah SP8. Lepas itu saya tak ingat, saya sedar saya berada di hospital sahaja'.

SUBMISSION

[9] In his submission attacking the decision of the learned judge in the court below, learned counsel for the appellant raised several grounds which could be grouped under the following headings:

(a) the defence of automation;

(b) the evidence of identification of the deceased;

(c) no evidence of the pronouncement of Rozita's death at scene;

(d) the defence of sudden fight; and

(e) the defence of provocation.

[10] We will deal with these grounds in turn although not necessarily in the order that the grounds were submitted by learned counsel for the appellant.

DECISION

Identity of the deceased

[11] In the additional petition of appeal, learned counsel for the appellant complained that the learned judge of the High Court erred in failing to find that the identification made by PW12 to PW9 before the post-mortem was not accurate because PW12 did not see the deceased's face in the kitchen at the scene on 3 September 2001. Elaborating on the point before us learned counsel submitted that PW12 was not the proper person to identify the deceased to PW9. He argued that instead, a member of the deceased's family or at least Cpl Mokhtar bin Shuib who sent the body to the hospital would have been the better person to identify the deceased's body. So, he submitted that the identity of the deceased had not been conclusively proven and hence, the prosecution failed to prove the death of Rozita.

[12] We do not think there is merit in this submission. To make out the case of murder against the appellant, the first ingredient which the prosecution had to prove was that the death of a human being had actually taken place — in this case the death of Rozita. PW8, one of the two witnesses who was present at the scene at the material time of the alleged offence, had testified that Rozita was her sister-in-law. She identified photographs P25(1–2) as the photographs of Rozita. She also identified photographs P24(2–10) (which included one photograph of Rozita which showed the wound on her neck) and said, 'keadaan di gambar P24(2–10) adalah seperti pada hari itu'. PW8 also identified PW7 as the first police officer to arrive at the scene on 3 September 2001. PW11, the other witness who was at the scene of the incident at the material time of the alleged murder, also identified photographs P25(1–2) as the photographs of Rozita, the appellant's wife. PW10 also identified P25(1) as the photograph of Rozita, his mother. PW7 also identified photographs P24(2, 9–10) as the photographs of the body of the woman he saw on the floor of the kitchen at the scene when he arrived there. PW7 remained at the scene until PW12 arrived with PW3, and PW7 saw PW3 taking photographs (P24(1–10)) at the scene. When PW12 arrived at the scene, in the course of his investigation there, he directed PW3 to take photographs (P24(1–10)) including the photograph of the body of the woman he saw in the kitchen at the scene. This is what PW12 said in evidence:

> Saya arahkan SP3 juga mengambil gambar mayat dalam keadaan ditutup dengan kain sarung dan *selepas kain dialihkan. P24 (1–10) diambil dalam keadaan asal*. Tanda E1–E7 yang boleh dilihat dalam gambar-gambar dibuat oleh saya. *Semasa saya berdekatan mangsa saya dapati ada kecederaan di bahagian leher*. (Emphasis added.)

We pause to say that in view of that excerpt from PW12's evidence, it is not true as stated in the appellant's additional petition of appeal that PW12 did not see the deceased's face. There is also evidence from PW12 that he obtained the deceased's particulars from PW8 and PW11. In his evidence, PW3 identified P24(1–10) as the photographs he took at the scene on 3 September 2001 on the instruction of PW12. PW3 also identified P25(1–4) as the photographs he took on 5 September 2001 on the instruction of PW12 at the mortuary of the Muar Hospital. On 5 September 2001 PW9 performed post-mortem on the deceased whose body was identified by PW12 as that of Rozita's. PW9 identified P25(1–2) as the photographs of the body on which he had performed the post-mortem. PW9 certified that Rozita's death was caused by the incised wound on the front of her neck which had severed the carotid artery resulting in massive loss of blood. He opined that death would have occurred within three minutes. None of the evidence which we have set out was challenged by the defence. We conclude that in the circumstances of this case it was proper for PW12 to identify the body of Rozita to PW9. In our judgment the evidence of the PW8, PW11, PW10, PW7, PW12, PW3 and PW9 which we have set out, considered cumulatively, had proven beyond reasonable doubt the identity of Rozita and the fact of her death.

No evidence of the pronouncement of Rozita's death at the scene

[13] In relation to this issue learned counsel's complaint to us is as follows. No one pronounced the deceased's death in PW8's house. Learned counsel argued that the only admissible evidence came from PW8's testimony when she said that after the arrival of the ambulance at her house, she was told by a medical officer that Rozita had died. However, learned counsel contended that that evidence given by PW8 was hearsay since the medical officer (who should have been called) was not called. He submitted that the court should invoke adverse inference under s 114(g)of the Evidence Act 1950. Continuing his submission learned counsel also pointed out that the Cpl Mokhtar bin Shuib, the officer who sent the deceased to the hospital was not called. He contended that Cpl Mokhtar's evidence was important because he would be able to throw some light on the question whether the deceased actually met her death at the scene or on the way to the hospital or at the hospital, especially in view of the absence of admissible evidence as to whether she was pronounced dead in the house. Further, he said that there was no evidence to show whether there was one wound or two wounds on the deceased's neck when she collapsed on the kitchen floor. Although there were two wounds, only one was fatal. He argued that it was probable therefore that the deceased was still alive in the house with only the stab wound which was not fatal. He contended that she must have been inflicted with the fatal incised wound on the way to the hospital or while being kept there waiting for the post-mortem was done on 5 September 2001.

[14] We regret to say that we cannot accept the submission of learned counsel for the appellant as aforesaid. First, it is settled law that in a charge of murder the prosecution must prove beyond reasonable doubt the following elements, namely:

(a) the death of a human being has actually taken place;

(b) such death has been caused by, or in consequence of the act of the accused; and

(c) that such act was done with the intention of causing death; or it was done with the intention of causing such bodily injury as: (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death; or the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause (i) death; or (ii) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

Apart from the aforesaid elements, there is no further legal requirement that the prosecution must prove the fact of the pronouncement of death of the victim at the scene of the alleged murder. The evidence on the pronouncement of the death of the victim at the scene, if available, may be relevant for the purpose of proving the elements of the offence of murder as aforesaid. However, the absence of such evidence would not affect the case against the accused if there is other evidence to establish the elements of the offence of murder beyond reasonable doubt. If the submission of learned counsel on this point was correct, no charge of murder could be brought in cases where the body of the victim could not be found (for example in cases such as in *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 or where only decomposed bodies or skeletal remains of the victims are found. That clearly is not the law. So, the non-calling of Cpl Mokhtar bin Shuib and the medical officer who told PW8 at the scene that Rozita had died was not fatal to the prosecution's case. However, the submission of learned counsel raised the question whether the prosecution had proved that Rozita's death was caused by, or in consequence of the act of the appellant. Indeed, as we understand it, the real thrust of the submission made bylearned counsel under this heading was that on the evidence before the court, there was a reasonable doubt whether the appellant caused the death of Rozita. This call for careful scrutiny of the evidence adduced by the prosecution. It is true that no one witnessed the actus reus — ie the act which caused the injury on Rozita which had caused her death, which fact was, from the learned trial judge's judgment, clearly in his mind when he analysed the evidence before him. However, PW8 and PW11 were present at the immediate scene of the incident at the material time as alleged in the charge. It is necessary at this stage to examine again the sequence of events which took place in or about the kitchen of PW8's house after the arrival of Rozita in the morning of 3 September 2001 as revealed by the evidence of PW8 and PW11, and consider where the totality of their evidence coupled with the other evidence adduced by

the prosecution lead us to. According to PW8, sometime between 7am–8am on 3 September 2001 she informed PW11 that Rozita had come to visit PW10. So, at about that time too Rozita must have been in PW8's house already. PW8 asked Rozita why she did not come for the wedding of her (PW8) child on 2 September 2001. Rozita replied that she could not make it. About 10–15 minutes after Rozita's arrival at PW8's house, the appellant came over to PW8's house. At that time PW8 and Rozita were in the kitchen of PW8's house. PW8 then went out to the *bangsal* which was outside her house to take some *nasi minyak* for Rozita. When she re-entered her house PW8 heard the appellant saying to Rozita 'abang pegang Ita pun tak boleh ke. Ita kan masih isteri abang'. At that time the appellant and Rozita were by the side of PW8's kitchen door. No other person was present. PW8 placed the *nasi minyak* on the stove and then went to the toilet outside her house. The appellant and Rozita were still by the side of the kitchen door. When PW8 re-entered the kitchen, the appellant and Rozita were still by the side of the kitchen door. Then, as PW8 was heating up the *nasi minyak*, Rozita came from the rear and patted PW8's shoulder, and called out PW8's name, 'Kak Kiah'. PW8 then turned. She felt that her dress was wet. PW8 saw blood on Rozita as well as at the kitchen door where she had stood earlier. At that time Rozita could still walk. Then, Rozita collapsed on the floor and was bleeding there. According to PW8, when Rozita patted her shoulder, the appellant was beside the kitchen wall. After Rozita collapsed on the floor, PW8 saw blood on the appellant's neck. Then the appellant lost his consciousness. Later, the appellant got up and hit his head against the wall. When all these were happening, apart from PW8, Rozita and the appellant, there was no other person in the kitchen. Then, PW11 entered the kitchen and took the knife from the appellant. The knife (P8A) was put on a chair and covered with a towel. PW11 left to summon an ambulance. Then PW8 saw the appellant hitting his head against the wall again. At this stage we turn to the relevant part of PW11's evidence. When PW11 was at the *bangsal* by the side of his house, cleaning some unwashed cooking pots, he saw PW8 at the *bangsal*. PW8 took some *nasi minyak* from a cooking pot. PW11 asked PW8 who would want to eat *nasi minyak* that early in the morning? Then, PW8 took the *nasi minyak* into the kitchen and PW11 continued with his chores. About 10–15 later, PW11 heard a loud voice of a quarrel inside his house. PW11 took no heed as he was used to the quarrels between the appellant and Rozita. Five to six minutes later, PW11 heard the voice of Rozita crying out, 'Kak Kiah'. PW11 rushed into the kitchen of his house and saw Rozita, who was then covered with blood, staggering in the kitchen. Then Rozita collapsed onto the floor. At that time the appellant was in kitchen. The appellant was holding a knife and pointed it at himself. When PW11 tried to seize the knife from the appellant, the appellant stabbed his own neck with it. Then the appellant collapsed onto the floor. The appellant, who was still holding the knife, pointed it at his stomach. However, PW11 succeeded in seizing the knife from the appellant and put it on a chair. From the evidence of PW8 and PW11 that we have just set out, the injuries on Rozita's neck must have been inflicted between

the time PW8 re-entered the kitchen (after going to the toilet), at which point the appellant and Rozita were still by the side of PW8's kitchen door, and the time Rozita patted PW8's shoulder from the rear and cried out 'Kak Kiah' when PW8 was heating the *nasi minyak*. It is clear that in between the two events particularly when PW8 was heating the *nasi minyak*, and before Rozita patted PW8's shoulder, the last and only person who was with and near Rozita was the appellant. Indeed, when Rozita patted PW8's shoulder, the appellant was beside the kitchen wall. Rozita's cry 'Kak Kiah' was heard by PW11 who rushed into the kitchen and saw Rozita staggering before collapsing on the kitchen floor. At that time the appellant was also in the kitchen holding a knife which he pointed at himself. When PW11 tried to seize the knife from the appellant, the appellant stabbed his own neck with it, before falling onto the floor. The appellant pointed the knife at his stomach but PW11 succeeded in seizing the knife (P8A) from the appellant. According to PW8, P8A did not come from her house. In fact PW10 testified that P8A was usually kept in his house and that it was the appellant who kept and used the knife. P8A together with other relevant exhibits were sent to the government chemist for analysis. Dr Seah Lay Hong ('PW14') who carried out the DNA analysis certified that the human blood on P8A came from two individuals, one male and the other a female. The main contributor was the male. The main contributor was the blood of the appellant from exh E19. The female contributor was the blood stains taken from PW8's shirt ('E13'), and PW8's batik sarong ('E14'). The DNA profiles derived from the shirt (E13) and the sarong (E14) were similar, indicating a common origin. Another chemist ('PW13') certified that the blood stain from E13 and E14 belonged to the same blood group as Rozita's blood group (group 'O'). The finding with regard to the blood on PW8's shirt (E13) and PW8's sarong (E14) is very significant in the light of PW8's evidence that when Rozita patted her shoulder and she turned, PW8 felt that her dress was wet, and that at that time there was blood on Rozita and the kitchen door. Now, Rozita's blood could not be present on P8A by coincidence! This brings us to the evidence of PW9. He certified that the incised wound on the front of Rozita's neck was the fatal wound. As would be recalled, learned counsel for the appellant submitted that since there was no evidence to show whether there was one wound or two wounds on the deceased's neck when she collapsed on the kitchen floor, and that although of the two wounds found by PW9 only one was fatal, it was probable that the deceased was still alive in the house with only the stab wound which was not fatal, and that she must have been inflicted with the fatal incised wound on the way to the hospital or in the hospital before the post-mortem was done on 5 September 2001. With the greatest of respect we do not agree. It appears that learned counsel had oversimplified PW9's evidence, emphasised only on certain parts of his evidence and forgot the rest of it. PW9 found that the incised wound had severed Rozita's carotid artery which supplied blood to the brain, resulting in the loss of a lot of blood. He opined that death would occur within three minutes. The massive loss of blood due to the severance of the carotid artery by the incised wound was consistent

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with the evidence of PW8 who saw blood on Rozita and at the place where Rozita had stood earlier, when Rozita patted her, and that Rozita was bleeding after she collapsed on the floor. That evidence of PW8 was also consistent with PW11's evidence when he testified that when he entered the kitchen after the Rozita's cry 'Kak Kiah', he saw Rozita who was covered with blood, staggering in the kitchen. Indeed, photographs P24 (2–10), taken at the scene by PW3 before Rozita was taken to the hospital, were also testimony to the massive loss of blood which PW9 explained in his evidence. It is also clear from PW9's evidence that the incised wound was the larger and more conspicuous of the two wounds. This is also evident from photograph P24(10). PW7, police sergeant who arrived at the scene at about 8.50am on 3 September 2001, saw wounds on the neck of Rozita, who according to PW7 was not breathing. PW12 who arrived at the scene at about 10am on 3 September 2001 also saw wound on Rozita's neck. More importantly, PW12 directed PW3 to take photographs of Rozita's body in the original position as he saw it at the scene after removing the cloth which covered her face. According to PW12, photographs P24 were taken 'dalam keadaan asal'. Photographs P24 were taken at the scene on 3 September 2001 before Rozita's body were taken to the Muar Hospital. The crucial thing is that one of the photographs taken (P24(10)) shows clearly the incised wound on the front of Rozita's neck — the fatal wound. In the light of all these evidence we cannot accept learned counsel's theory that the fatal wound was caused on the way to the hospital or while waiting for the post-mortem to be done. There is no doubt in our mind that the fatal wound as well as the stab wound were inflicted on Rozita at the place and at the material time stated in the charge. We also have no doubt that the totality of PW8's and PW11's evidence considered cumulatively with the other evidence adduced by the prosecution which we have discussed at length, lead us only to one conclusion — ie the death of Rozita was caused by, or in consequence of the act of the appellant at the scene and at the time stated in the charge. We find that the learned judge in his careful judgment had meticulously analysed the evidence of PW3, PW7, PW8, PW10, PW11, PW12, PW13, PW14 and the other witnesses called by the prosecution (pp 28–33 of the appeal). In the end he found that there was no possibility that the accused was not the assailant or that P8A was not the weapon. We cannot find fault with the analysis and finding of the learned judge as aforesaid. On the question of intention, the learned judge held that the act of the appellant which caused the death of Rozita was done with the intention of causing such bodily injury to Rozita which was sufficient in the ordinary course of nature to cause death. In other words he was satisfied that the prosecution had proven the element of intention provided under s 300(c) of the Penal Code. We agree with him. In *Virsa Singh v The State of Punjab* AIR 1958 SC 465, explaining the third clause of s 300 of the Indian Penal Code (equivalent to s 300(c) of our Penal Code), V Bose J said:

(12) To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300, thirdly:

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; these are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further; and

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300, thirdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional. (Emphasis added.)

From the evidence of PW9, the presence of the bodily injuries on Rozita and the nature of those injuries (the first and the second elements) had clearly been established by the prosecution. The third element to be considered was the proof that there was an intention on the part of the appellant to inflict the injuries found to have been inflicted on Rozita — ie that it was not accidental or intentional? For this the approach to be taken was explained by the Indian Supreme Court in *Virsa Singh* as follows:

In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he

cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad based and simple and based on common sense: the kind of enquiry that 'twelve good men and true' could readily appreciate and understand. (Emphasis added.)

Here again PW9's evidence provides the answer. There were two wounds on Rozita, both of which were on the front of the neck. The incised wound was no ordinary incision. The weapon (P8A) must have been used with deliberate force and exactness that it resulted in an incised wound which was nearly horizontal measuring 5.5cm on its upper edge and 6cm on its lower edge and 2.5cm deep which had severed the carotid artery (the artery which supplied blood to the brain), causing massive loss of blood. According to PW9, death wound occur within three minutes. Further, the conduct of the appellant in stabbing his own neck with P8A and attempting to stab his stomach was not consistent with the injuries on Rozita being inflicted accidentally. We have no doubt that the appellant intended to cause the injuries on Rozita's neck. Having considered the type and gravity of the incised wound on Rozita's neck which had been described by PW9, we also have no doubt that the incised wound was sufficient in the ordinary course of nature to cause the death of Rozita. The learned trial judge was right when he concluded that the prosecution had made out a prima facie case of murder against the appellant.

The defence of automatism

[15] In the court below this was never raised as a defence. It was raised for the first time before us. In fact this was the main ground of the appellant's appeal. For this learned counsel applied to use the additional petition of appeal. The learned deputy who responded to the appeal had no objection and we allowed the appellant's application. In his submission learned counsel said that he was relying on non-insane automatism. The thrust of his submission is as follows. He referred to PW8's evidence where she said that she saw the appellant hitting his head against the wall *after* incident. Learned counsel submitted that the inference to be drawn from that evidence was that the appellant must have hit his head against the wall *before* the incident also. Continuing his submission, learned counsel argued that since the appellant was relying on the defence of non-insane automatism, the burden was on the prosecution to eliminate that defence. In this regard he contended that the appellant had raised the defence in his cautioned statement, and that therefore the police must caused his head to be examined to verify whether there was a concussion. We do not agree. First, we would state the law on automatism distilled from familiar authorities on the subject. Automatism refers to a state of defective consciousness in which a person performs unwilled acts. It may be caused by concussion, sleep disorders, acute stress, epilepsy and other elements like hypoglycaemia. The House of Lords has held that there is in law two types of automatism, namely, insane and non-insane automatism. Insane automatism is where the primary

cause of the abnormality is internal to the accused and prone to recur. The condition will be classified as a disease of the mind. It will then fall within the McNaghten rules. Non-insane automatism occurs where the abnormality is caused by a factor external to the accused like, for example, a blow to the head, medication, alcohol or drug. The distinction is important as it will determine the onus of proof. Where the condition is a disease of the mind, it will fall within the McNaghten rules which is reflected in s 84 of the Penal Code. This section, read with s 105 of the Evidence Act 1950, will place the onus on the accused to establish the defence. If the condition does not produce a disease of the mind, such as in the instant appeal the onus will be upon the prosecution to exclude the alleged incapacity (see *Public Prosecutor v Kenneth Fook Mun Lee (No 1)* [2002] 2 MLJ 563, *Bratty v Attorney-General for Northern Ireland* (1981) 46 Cr App R 1, *R v Hennessy* [1989] 2 All ER 9, *Regina v Quick; Regina v Paddison* [1973] QB 910, *R v Burgess* (1991) 93 Cr App R 41, *Police v Bannin* [1991] 2 NZLR 237). Automatism had also been defined to mean an act which is done by the muscles without any control by the mind such as a spasm, a reflect action or a convulsion, or whilst sleep walking (see *Bratty v Attorney-General for Northern Ireland* (1981) 46 Cr App R 1, per Lord Denning at p 16). Automatism was also explained simply 'as an action without any knowledge of acting, or without any consciousness of what is being done (see the judgment of the Court of Appeal in New Zealand in *The Queen v Cottle* [1958] NZLR 999 at p 1020). In *Police v Bannin*, Fisher J said:

> The question is whether the accused has retained sufficient mental capacity to reach the threshold required for the particular crime with which he is charged. That threshold will vary from one type of crime to another. It will be affected by the reasons for which a particular class of conduct was proscribed by the law, the implied statutory intention as to the level at which citizens should be held responsible for their conduct, and the way in which the law has defined the crime. *In short, the focus should lie upon the elements of the charge*. (Emphasis added.)

We now turn to the evidence. Elsewhere in this judgment, when we dealt with the question whether Rozita's death was caused by, or in consequence of the act of the appellant, we have examined the evidence of PW8 and PW11 on the sequence of events which took place in or about the kitchen of PW8 after the arrival of Rozita at PW8's house in the morning of 3 September 2001 until her body was taken to the hospital. We have also considered the affect of the forensic evidence provided by PW14 and PW13. We then considered PW9's evidence on the injuries on Rozita's neck and the cause of her death. We have said that totality of all that evidence lead us to only one conclusion — the death of Rozita was caused by, or in consequence of the act of the appellant. We also said that we have no doubt that that act of the appellant which caused the death of Rozita was done with the intention of causing such bodily injury which was sufficient in the ordinary course of nature to cause death. We find nothing in the evidence adduced by the prosecution and the defence to raise a reasonable doubt that the appellant was incapacitated by non-insane automatism. As

would be recalled, commencing his submission on automatism, learned counsel for the appellant relied on PW8's evidence. As we understand the submission, the external factor which was alleged to have caused the non-insane automatism which incapacitated the appellant was concussion which learned counsel contended, was brought about by the act of the appellant hitting his head against the kitchen wall. We do not agree. We find nothing at all in PW8's or PW11's or any of the prosecution witnesses' evidence to show that the appellant had hit his head against the kitchen wall *before* Rozita patted PW8's shoulder and cried out 'Kak Kiah'. So, learned counsel's submission that the appellant must have hit his head against the wall *before* the incident because PW8 saw him hitting his head against the wall *after* the incident was too farfetched and a pure speculation. Learned counsel also contended that the appellant had raised the defence in his cautioned statement, and that therefore the police must cause his head to be examined to verify whether there was a concussion. We find nothing in the appellant's cautioned statement to show that the appellant had raised that defence. There is nothing in the cautioned statement to say that he had hit his head against the wall before the incident. There is nothing in the cautioned statement about any other external factors which could possibly bring about non-insane automatism. We find nothing in the cautioned statement which could serve as a sufficient basis for the police to entertain even a reasonable suspicion that he had a concussion. Indeed, under cross-examination by the DPP, the appellant admitted that he had no history of *hilang ingatan* atau *sakit jiwa*. For convenience we set out the content of the appellant cautioned statement:

> Pada 9.6.2001 hari Sabtu, saya dapat bil telefon, habis saya tunjukkan kepada isteri saya Rozita. Saya tanyakan pada dia apasal bil ini terlampau tinggi. Kemudian dia jawab, kalau abang telefon nombor ini, Ita akan lari ikut orang ini. Kemudian dia pun bercakap hari minggu dia ada kursus di Melaka selama tiga minggu. Saya tidak puas hati, pukul 8.00 pagi itu (hari Sabtu) saya pergi ke Hospital Muar dan tanya boss isteri saya iaitu Encik Jefri mengenai perkara ini. En. Jefri beritahu tidak ada. Hari Isninnya saya datang ke Hospital pujuk orang rumah saya suruh balik. Dia kata dia nak tenangkan fikiran. Habis, lat dua lagi... saya datang Hospital lagi bawa anak saya yang kecik jumpa orang rumah saya. Orang rumah saya cakap jangan sebok, orang nak kerja dan suruh saya balik. Lat dua tiga hari saya datang lagi dan orang saya terus ajak saya pergi ke Pejabat Kadi. Saya balik terus pergi ke Pejabat Kadi, saya repot, cakap orang rumah saya semenjak 9.6.2001 pergi kerja tidak balik, lepas itu tidak lama Pejabat Kadi panggil saya suami isteri. Di Pejabat Kadi isteri saya cakap saya macam-macam. Dia cakap saya kaki judi, kaki minum. Saya suruh dia balik rumah. Dia tak nak juga, dia kata dia ada rumah sewa di Parit Sakai. Kemudian saya pun pergi ke rumah Parit Sakai pujuk dia balik, dia tak nak balik juga. Lama-lama dia telefon anak dia dan suruh anak dia pergi hospital. Dia kasi duit tambang RM25/= pada anak dekat sekolah suruh dia pergi Hospital besoknya. Bila saya balik kerja tengok budak tidak ada. Saya cari-cari di Parit Jawa pun tak ada, habis saya tanya pada akak ipar saya dan dia cakap nampak anak saya tunggu bas. Habis lepas itu akak ipar saya telefon ke rumah yang orang rumah saya sewa dan akak ipar bagitahu anak ada di rumah sewa orang rumah saya, habis saya nak pergi ambik

anak saya malam dalam pukul 7.00, sekali tengok orang rumah saya dan anak dah tak ada. Lepas itu akak ipar saya pergi ke rumah bapak dia, juga tak ada. Lepas itu akak ipar saya balik rumah dan saya buat repot di Parit Jawa mengatakan anak saya emak dia ambik tak bagitahu saya, tak lama itu anak saya telefon saya, dia kata hari Isnin orang rumah nak bawak anak jalan bandar. Lepas itu anak saya demam, kemudian saya ada rumah, anak saya yang tua nama Zainuddin nak pergi kerja, dia cakap dengan saya emak ada rumah sebelah. Lepas itu saya pergi pujuk dia dan cakap anak sakit dan suruh dia pergi tengok. Dia pergi tengok naik rumah. Saya pun cakap dengan dia, kenapa tak balik dah lama, dah dekat tiga bulan, kita kan suami isteri, anak sudah ada dan anak rindukan mak. Dia cakap kita sudah lama tak serumah dan tak boleh duduk rumah ini. Saya tanya kenapa tak boleh, dia tak jawab dia hanya cakap nak cari bajunya dan terus ke dapur nak cari baju. Saya nak cium dia sekali, dia tak kasi. Saya cakap kan kita suami isteri kenapa tak kasi. Dia cakap, kita ini sebagai kawan saja. Saya cakap macam mana sebagai kawan. Lepas itu saya macam marah dan tak ingat isteri saya mahu keluar rumah pergi rumah sebelah. Dia cakap pada anak dia, dia nak ke Muar makan Kentucky. Habis saya cakap, abang pun nak ikut, boleh tak. Dia cakap buat segan. Habis itu saya makin tak ada ingatan. Habis lepas tu dia pergi rumah sebelah. Habis saya ni, ingatan saya macam tak berapa anu, saya pun ambil pisau yang buat rewang nak tolong sebelah rumah abang. Fikiran saya macam tak berapa betul. Macam mana saya boleh masuk ke rumah abang saya pun saya tak tahu. Sadar-sadar saya kat Hospital.

S: Adakah apa-apa yang hendak kamu tambah atau pinda dalam percakapan yang kamu berikan ini?

J: Tiada. (Emphasis added.)

We have underlined the portion which is most relevant to the issue under discussion. This is the part where Rozita refused to allow the appellant to kiss her and the appellant asked why. Rozita said they were just friends (*kita ini sebagai kawan*). The appellant said he could not accept that, and asked Rozita, 'macam mana sebagai kawan?' Then the appellant said he was angry and could not remember, 'Lepas itu saya macam marah dan *tak ingat* isteri mahu keluar pergi rumah sebelah'. Although he said he could not remember, the appellant recalled Rozita telling PW10 that she wanted to go to Muar to eat 'Kentucky'. The appellant said he wanted to come along, to which Rozita said 'buat segan'. Then the appellant said he lost his memory. However, he remembered Rozita going to the house next door (PW8's house), 'Habis tu dia pergi rumah sebelah'. He recalled how he felt, and more importantly he remembered taking a knife. Describing how he felt the appellant said 'habis saya ni, ingatan macam tak berapa anu, saya ambil pisau yang buat rewang nak tolong sebelah rumah abang'. Then, again he said something was wrong with his memory, 'fikiran saya macam tak berapa betul. Macam mana saya boleh masuk ke rumah abang saya saya pun tak tahu. Sedar-sedar saya kat Hospital'. The version he gave in his evidence was substantially similar to the version in his cautioned statement, except that the former was a bit more detail:

> Perasaan saya macam hilang fikiran dan hilang ingatan. Saya tidak terima hakikat kata Rozita kerana dia masih isteri saya. Saya masuk ke rumah ambil pisau untuk potong dawai bangsal. P8A ini adalah pisau yang saya ambil. Saya ambil pisau itu dari dalam bilik tidur saya. Saya simpannya dalam bilik tidur saya, sebab takut budak buat main. Saya ambil P8A untuk tujuan memotong dawai bangsal. Dengan pisau, saya turun rumah. Fikiran saya bingung dan hilang ingatan. Dengan pisau saya pergi ke rumah SP8. *Lepas itu saya tidak ingat, saya sedar saya berada di hospital sahaja*. (Emphasis added).

So, it appears that in his own words, the appellant lost his mind and memory (*hilang ingatan dan hilang fikiran*), not because of any concussion, but because he could not accept Rozita telling him that they were no longer husband and wife. It is also clear to us that a moment later the appellant regained his memory, and was master of his mind and in complete control of what he was doing, for he remembered going into his house and taking P8A from his bedroom. Then he also recalled going to PW8's house. Soon after, he said he cannot remember (*Lepas itu saya tidak ingat*). In this connection in *Bratty v Attorney-General for Northern Ireland*, Lord Denning held that the requirement that the act constituting a voluntary act is essential not only in a murder case, but also in every criminal case, and no act is punishable if it is done involuntarily. However, in the criminal case an act is not to be regarded as an involuntarily act simply because the doer does not remember. This is how His Lordship explained it:

> My Lords, in the case of *Woolmington v Director of Public Prosecutions* (1935) 25 Cr App R 72 at p 96; [1935] AC 462 at p 482 Viscount Sankey LC said:
>
> When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused.
>
> The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. No act is punishable if it is done involuntarily; and an involuntary act in this context — some people nowadays prefer to speak of it as 'automatism' — means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking. The point was well put by Stephen J. In 1889:
>
> ... can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing;
>
> See *The Queen v Tolson* (1889) 23 QBD 168 at p 187. *The term 'involuntary act' is, however, capable of wider connotations: and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no*

defence to him to say, 'I don't know what happened. I cannot remember a thing': see Hill v Baxter (1958) 42 Cr App R 51; [1958] 1 QB 277. Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time, see *Russell v HM Advocate* [1946] SC (J) 37; *Regina v Podola* (1959) 43 Cr App R 220; [1960] 1 QB 325. Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it. When a man is charged with murder, and it appears that he knew what he was doing, but could not resist it, then his assertion 'I couldn't help myself' is no defence in itself: see *Attorney-General for the State of South Australia v John Whelan Brown* (1960) 44 Cr App R 100; [1960] AC 432. (Emphasis added.)

[16] We do not think that what the appellant said in his cautioned statement or evidence has raised any reasonable doubt regarding his alleged incapacity (non-insane automatism). In *Bratty v Attorney-General for Northern Ireland*, the Lord Chancellor said at p 13:

... for a defence of automatism to be 'genuinely raised in a genuine fashion,' there must be evidence on which a jury could find that a state of automatism exists. By this I mean that the defence must be able to point to some evidence, whether it emanates from their own or the Crown's witnesses, from which the jury could reasonably infer that the accused acted in a state of automatism. Whether or not there is such evidence is a matter of law for the judge to decide. In the case before Your Lordships, in my opinion, McVeigh J was right in ruling that there was no evidence on this point fit to be left to the jury. I have already dealt with the unsuccessful attempt to prove psychomotor epilepsy and the concession before us that there was nothing in the evidence to show or suggest that there was any other pathological cause. If one subtracts the medical evidence directed to the establishment of psychomotor epilepsy, I am of opinion that there was not any evidence on which a jury could properly have considered the existence of automatism. Counsel for the petitioner directed our attention to the petitioner's statement, to his evidence and to his previous conduct. In my view, they do not provide evidence fit to be left to a jury on this question. They could not form the basis of reasonable doubt. (Emphasis added.)

On the evidence available we are satisfied that the prosecution had disproved the alleged incapacity of the appellant (non-insane automatism) beyond reasonable doubt. The defence of non-insane automatism therefore failed.

Provocation

[17] In the court below this was the only defence raised by the appellant. Before us the complaint was that the learned judge in the court below erred in not considering adequately the defence of provocation.

[18] Only grave and sudden provocation will reduce the offence of murder to culpable homicide not amounting to murder. Exception 1 to s 300 of the Penal Code provides:

A Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

B The above exception is subject to the following provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

C (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

D

[19] The test to be applied in order to determine whether culpable homicide which would otherwise be murder is manslaughter by reason of provocation is whether the provocation was sufficient to deprive a reasonable man his self control, not whether it was sufficient to deprive the particular person charged E with murder (eg a person afflicted with defective control and want of mental balance) of his self control (see *The King v Lesbini* [1914] 3 KB 1116, per Lord Reading CJ, *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143, *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281). Thus the Federal Court held that to succeed in a defence of F grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the acts of the deceased that the accused had been deprived of the power of self control, but such acts of provocation would also have deprived a reasonable man of the power of self control (see *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153 at p 154 (FC)).

G

[20] Who is 'a reasonable man'? In *Ghulam Mustafa Gahno v Emperor* (1939) 40 Cr LJ 778 at pp 779–780, the court explained:

H In short, the 'reasonable man' always a some what ideal figure, is not a person of identical habits, manners and feelings wherever he may be. We think the generality of the words used in the judgment necessarily imply some qualification. The 'reasonable man' is the normal man of the same class or community as that to which the accused belongs; and we think the judgment which refers however specifically to 'mental ability' should be read in conjunction with exception 1 to s 300 of the Indian I Penal Code, which is as follows:

Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

> Now, it is to be noted that the exception refers to the offender. The words are: 'Culpable homicide is not murder if the offencer, whilst deprived of the power of self-control …'; it does not say 'if the offender being a reasonable man' but we think it means so, bearing in mind the habits, manners and feelings of the class or community to which the offender belongs.
>
> We do not think it was intended that in deciding whether the provocation was grave and sudden, it is open to an accused person to show that he was person of particular excitability or of a particular mental instability or of a particularly volatile temperament. It was not intended that the law should take into account the peculiar idiosyncricies of the offending individual, but it was intended that the court should take into account the habits, manners and feelings of the class or community to which the accused belonged. And in determining whether the provocation was so grave and sudden as to deprive the offender of the power of self control, the court will consider whether that provocation would be so grave and sudden as to deprive the ordinary man of the class or community to which the offender belonged of the power of self control.

[21] In considering whether the provocation will deprive a reasonable man of the power of self control, it is also important to consider whether the retaliation was commensurate with the degree of provocation given by the deceased. This was explained by the court in *Vijayan v Public Prosecutor* [1975] 2 MLJ 8:

> In our judgment, under our law, where an accused person charged with murder relies on provocation and claims the benefit of exception 1 to s 300, the test to be applied is, would the act or acts alleged to constitute provocation have deprived a reasonable man of his self control and induced him to do the act which caused the death of the deceased and in applying this test it is relevant to look at and compare the act of provocation with the act of retaliation.
>
> To put it in another way, it must be shown distinctly not only that the act which caused death was done under the influence of some feeling which took away from the accused all control over his actions, but also that that feeling had an adequate cause and here again it is relevant to compare the provocative act with the act of retaliation. If it can reasonably be said that these two acts more or less balance each other in the sense that the proved provocation could have driven a reasonable person to do what the accused did, then he is entitled to the benefit of this exception. On the other hand, if the act of retaliation is entirely out of proportion to the provocation offered, the plea of grave and sudden provocation fails. It is needless to add that the matter must be considered objectively and the burden is on the accused to establish provocation on a balance of probabilities: *Jayasena v Regina* [1970] 1 All ER 219.

[22] The importance of comparing the retaliation by the accused with the provocation given by the deceased was also explained much earlier by the House of Lords in *Attorney-General for Ceylon v Kumarasinghege Don John Perera* [1953] AC 200 at pp 206–207:

> In directing the jury that they must ask themselves whether the kind of provocation actually given was the kind of provocation which they as reasonable men would regard as sufficiently grave to mitigate the actual killing of the woman, in the opinion of Their Lordships the judge was merely directing the jury as to how they should determine whether the provocation was grave. The words 'grave' and 'sudden' are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. *It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation, and provocation which may cause the sufferer to lose a degree of control, but will not excuse the use of a deadly weapon*, and in the opinion of their Lordships it is quite wrong to say that because the code does not in so many words say that the retaliation must bear some relation to the provocation it is true to say that the contrary is the case. (Emphasis added).

[23] In the instant case, in considering the defence of provocation the learned trial judge examined the events which occurred:

(a) on 9 June 2001 when Rozita left the matrimonial home;

(b) after 9 June 2001 but before 3 September 2001; and

(c) on 3 September 2001.

The learned trial judge found that the events in the first two groups were too far back and therefore too remote to constitute sudden provocation, even if they constituted provocation in the first place. This is how he explained it:

> Putting everything together, it was therefore the defence story that there were no matrimonial differences before 9 June 2001, but on 9 June 2001 Rozita made an excuse and left the matrimonial home when the accused uncovered the telephone bill for May 2001 and enquired about a call to telephone 019–7412027. On 9 June 2001, Rozita was supposed to have said 'kalau abang telefon nombor ini, Rozita akan ikut lelaki ini lari'. On 9 June 2001, Rozita was also supposed to have said that she had a three week course at Malacca. That defence story had the basis of some nascent facts. It was proved that Rozita could not have had a three week course at Malacca, that Rozita left the matrimonial home on 9 June 2001, and that, as said, several calls were made from the telephone registered in Rozita's name to telephone 019–7412027. Nevertheless, it did not automatically follow that therefore Rozita must have said 'kalau abang telefon nombor ini, Rozita akan ikut lelaki ini lari'. But for the sake of argument, let it be accepted that Rozita indeed said those words on 9 June 2001. That would mean that Rozita was in touch with someone, that Rozita on 9 June 2001 lied about a three week course at Malacca, and that Rozita on 9 June 2001 left the matrimonial home without reason. But if those words and acts of Rozita could have provoked the accused, then it would have been some three months before 3 September 2001, some three months before the act in question. Provocation must also be sudden. 'In order to bring the case under exception 1, the accused has to establish not only that the provocation was grave but it was also sudden. The word 'sudden' involves 2 elements. Firstly, the provocation must be

unexpected. If an accused plans in advance to receive a provocation in order to justify the homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief. If a man giving the provocation is killed within a minute after the provocation, it is a case of sudden provocation. If the man is killed six hours after the provocation, it is not a case of sudden provocation. When it is said that the provocation should be sudden, it is implied that it must have immediately preceded the act in question. A person may by repeated or continuous provocation arouse another to state of mind when the provocation immediately preceding the act is only the last straw' (Ratanlal and Dhirajlal at p 1331). *Suffice it to say that the events on 9 June 2001 were too far back and therefore too remote to constitute sudden provocation, if even they constituted provocation in the first place*.

The same could be said of the other events before 3 September 2001. The refusals by Rozita to return home were communicated in June/July of 2001, some two or three months before the act in question. The request for a divorce was made in June/July of 2001, some two or three months before the act in question. The allegations by Rozita to the Ustaz that the accused was a gambler, a drinker, an improvident husband and so forth were made at the end of June 2001, some two months before the act in question. The incident about SP10 not coming home occurred on 8 August 2001, about a month before the act in question. Quite clearly, there was a significantly long interval between those events and the act in question. The refusals to return home, the request for a divorce, the allegations to the Ustaz, and the incident on 8 August 2001, could not amount to sudden provocation, if even they constituted provocation in the first place. In any case, after 8 August 2001 or thereabout, the accused did not see Rozita again until 3 September 2001, ie until the fateful day. In the interim, Rozita could not have caused any provocation of any sort to the accused. Given that there was a break in contact for about a month, there was no merit in the submission that there was the application of continuous provocation from 9 June 2001 to the fateful day. Whatever provocation that preceded, if at all, should have gone cold by the time the accused saw Rozita on 3 September 2001. In short, the events that preceded 3 September 2001 could not constitute sudden provocation. (Emphasis added.)

We agree with his conclusion.

[24] This bring us to the events on 3 September 2001. Going back a little after the event which occurred on or about 8 August 2001 where the appellant met PW10 and Rozita at the *kadi*'s office, there is no evidence to show what the appellant saw Rozita again until 3 September 2001. There was therefore a lull of about three weeks. Then on 3 September 2001 while he was with PW10 in the hall of his house, at about 7am the appellant was told by his other son Zainuddin, that Rozita was in PW8's house. The appellant said he was happy because he loved Rozita, 'semasa saya dapat tahu Rozita berada di rumah sebelah saya rasa suka, rasa gembira kerana saya sayang dia'. Then he went to PW8's house and met Rozita in the kitchen. So, even if what Rozita had said and done on numerous occasions previously, beginning on 9 June 2001, had provoked the appellant, they had not caused the appellant to attack Rozita

when he first met her in PW8's kitchen. Instead, the appellant told Rozita that PW10 was down with fever and asked her to see him. Rozita kept quiet. The appellant said that he was sad that Rozita did not heed his request. The appellant went back to his house and told PW10 that Rozita was in PW8's house. Three to four minutes later, Rozita did come over to the appellant's house and sat near PW10. Rozita told PW10 that she wanted to take PW10 to eat 'Kentucky'. The appellant told Rozita that he wanted to come along as it had been long since he last met Rozita. Rozita did not welcome the appellant to come along. Rozita said, 'buat segan sahaja'. That saddened the appellant. The appellant also persuaded Rozita to return home, but she said she had rented a house. Thereafter, Rozita went to the kitchen to take her clothing. The appellant followed her to the kitchen. At the kitchen, he repeated his wish of wanting to come along with Rozita and PW10 to eat 'Kentucky'. Rozita again said, 'buat segan sahaja'. The appellant said why should he be ashamed as they were husband and wife 'saya kata apa segan, sedangkan kita suami isteri'. Rozita kept quiet. Then, the appellant tried to hold and kiss Rozita but she spurned him. This angered the appellant. It is not difficult to imagine the frustration of the appellant who had, since 9 June 2001 been longing for his beloved wife, and had persistently pleaded with her to return home. However the appellant did not do anything to Rozita. Soon after, when Rozita went down the ladder to leave the appellant's house, the appellant stood near the door. When she reached the ground Rozita said, 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja'. This broke his heart. He felt humiliated and useless like a 'dayus', 'semasa saya dengar Rozita kata kita bukan suami isteri lagi, sebagai suami saya rasa dayus kerana saya mampu lagi kasi nafkah batin, saya bukan ada penyakit yang tak boleh diubati, dan saya bukan mati pucuk'. He said he did not accept what was said by Rozita because she was still his wife. The appellant said he understood those words by Rozita to mean that there was no more relationship between them. To consider the impact on what Rozita had said and done on the appellant thus far, we reiterate the appellant's description on how he felt then and what happened thereafter, 'Perasaan saya macam hilang fikiran dan hilang ingatan. Saya tidak terima hakikat kata Rozita kerana dia masih isteri saya. Saya masuk ke rumah ambil pisau untuk potong dawai bangsal. P8A ini adalah pisau yang saya ambil. Saya ambil pisau itu dari dalam bilik tidur saya. Saya simpannya dalam bilik tidur saya, sebab takut budak buat main. Saya ambil P8A untuk tujuan memotong dawai bangsal. Dengan pisau, saya turun rumah. Fikiran saya bingung dan hilang ingatan. Dengan pisau saya pergi ke rumah SP8. Lepas itu saya tidak ingat, saya sedar saya berada di hospital sahaja'.

[25] So, what was said by Rozita on the ground appeared to have humiliated and offended the appellant and made him upset. He could not accept Rozita's remark that there was no more relationship between him and Rozita. Yet even at that point, no matter how humiliated and angry he might have been and however he felt about Rozita, bearing in mind what she done since 9 June

2001, the appellant did not attack Rozita there and then. Although the appellant seemed to say that what Rozita said had caused him to sort of lose his mind and memory (*perasaan saya macam hilang fikiran dan ingatan*), he remembered clearly what happened thereafter. He remembered going into his house and taking P8A from his bedroom. Then he said with the knife he got down from his house (*dengan pisau saya turun rumah*). A moment later he said he lost his memory, 'fikiran saya bingung dan hilang ingatan'. But then he said with the knife he went to PW8's house, 'dengan pisau saya pergi ke rumah SP8'. In other words his memory came back, but it faded away again a moment later, 'lepas itu saya tidak ingat, saya sedar saya berada di Hospital sahaja'. Going on the basis that the sequence of events on 3 September 2001 as narrated by the appellant is true, and assuming that what Rozita had said and done at the appellant's house on the morning of 3 September 2001 including her words that, 'sekarang kita bukan suami isteri lagi, kita cuma sebagai kawan sahaja', taken cumulatively with what she had done since 3 June 2001 had provoked the appellant, the question is did he attack Rozita straight away the moment he met her in PW8's house? The answer must be in the negative. This is clear from PW8's evidence. According to PW8, about 10–15 minutes after Rozita arrived at PW8's house the appellant came over to PW8's house. Nothing happened between the appellant and Rozita. At that time PW8 and Rozita were in the kitchen of PW8's house. PW8 then went out to the *bangsal* which was outside her house to take some *nasi minyak* for Rozita. When PW8 was outside her house, the appellant and Rozita were alone in PW8's house. As she was re-entering her house PW8 heard the appellant saying to Rozita, 'abang pegang Ita pun tak boleh ke. Ita kan masih isteri abang'. At that time the appellant and Rozita still by the side of PW8's kitchen door. Apart from what the appellant said to Rozita, nothing happened between them. PW8 placed the *nasi minyak* on the stove and then went to the toilet outside her house. When PW8 re-entered her kitchen, the appellant and Rozita were still by the side of the kitchen. Nothing happened between the appellant and Rozita at that point of time. Then, as PW8 was heating up the *nasi minyak*, Rozita patted PW8's shoulder from the rear and called out 'Kak Kiah'. PW8 turned and saw blood on Rozita. So, when the appellant met Rozita in PW8's house and although he must have P8A with him, he did not straight away attack Rozita. Instead, as we have shown, PW8's evidence revealed that he questioned Rozita, 'abang pegang Ita pun tak boleh ke. Ita kan masih isteri abang'. Although under cross-examination the appellant denied that he had questioned Rozita as such, his evidence under cross-examination by the DPP corroborated PW8's evidence to a certain extent. That part of the cross-examination is as follows:

A B C D E F G H I

DPP: Kamu sedar semasa pergi ke rumah SP8 dengan pisau.

Saksi: Tidak setuju.

DPP: Di dapur SP8, hanya ada kamu, SP8 dan Rozita.

Saksi: Tidak setuju.

DPP: *Pada masa itu, Rozita berdiri di tepi pintu dapur*.

Saksi: *Setuju*.

DPP: *Rozita tidak pegang apa-apa barang*.

Saksi: *Setuju*.

DPP: *Pada masa itu, SP8 sedang panaskan nasi untuk Rozita*.

Saksi: *Setuju*.

DPP: *Kamu pergi ke Rozita dengan P8A dan kata 'abang pegang Ita tak boleh ke, Ita masih isteri abang'*.

Saksi: Tak setuju.

DPP: *Rozita berdiri di situ dan tidak menjawab kamu*.

Saksi: *Setuju*.

That part of the appellant's evidence revealed that at the material time, Rozita was not holding anything and that she stood at the kitchen door and did not answer the appellant. Thus, on the evidence all that Rozita did in PW8's kitchen before she was attacked was not responding to the appellant's question. That in our view was not sufficient to amount to grave and sudden provocation in law.

[26] In the additional petition of appeal the appellant complained that the learned judge failed to consider series of provocative acts by Rozita beginning from 9 June 2001. We have dealt with the events which occurred before 3 September 2001. We have also considered the events which occurred in the appellant's house on 3 September 2001. No doubt the heart rending account in the appellant's testimony about the break up in his marriage with Rozita from 9 June 2001 when Rozita left their matrimonial home (although she had not been divorced by the appellant) until 3 September 2001 when they met again, demonstrated Rozita's defiance and recalcitrance, and we venture to say, even failure in her obligation as a Muslim wife and a mother to two children. What she did and said from 9 June 2001 to 3 June 2001 taken cumulatively would have tested the appellant's male ego as Rozita's husband and chipped away his patience. But then there is no such thing as gradual and accumulated provocation. Devoid of its gravity and suddenness, a gradual and accumulated provocation is not sufficient to constitute a defence under exception 1 to s 300 of the Penal Code (see the Federal Court judgment in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281). In *Che Omar bin Mohd Akhir v Public Prosecutor*, the facts of the case reveal that the appellant's wife had surreptitiously left the matrimonial home in Kuala Lumpur with her daughter and headed for her mothers's home in Kuching, Sarawak. Later, the appellant went to Kuching, and on the date of the offence, located his wife, who was then with another man (Awang) at the Satok Sunday Market. The appellant asked her why she treated him like that. She replied that

it was her own business, 'I can do what I like — why do you want to know about it'. He asked her again why she had not returned home for a week and where she was staying. She answered loudly saying what and where she was and with whom she was staying was her own business. He asked her again why she did not return to the house as it was their child's birthday. She answered that whether she wanted to return home or not was her own business. She also said she was not free. The appellant pointed at Awang (PW7) and asked her 'Who is that man?'. She answered 'He is my man — why do you want to know?' The appellant asked her 'How about me?' She replied, 'That's your business, you can go wherever you want!' He asked her again who was the man seated near to her. She replied, 'He is my man — why you want to know — you can go back and don't come again'. The appellant said that the deceased was talking loudly and roughly to him and as he could not stand her responses and the manner in which she answered him, which made him feel less than a man and caused him to suffer what he called 'dayus' in Malay, he therefore stabbed the deceased three or four times with the knife. The appellant's conviction for the murder of his wife and the death sentence on him was affirmed by the Federal Court. In his judgment speaking for the Federal Court, Nik Hashim FCJ said:

> In the present case, the only provocation was a suspicion in the mind of the appellant that the deceased was unfaithful to him when she referred to PW7 as 'He is my man'. What was found by the learned trial judge was that the provocation was gradual. He was right. *To our minds, there is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation*. Devoid of its gravity and suddenness (as in the case here) a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the PC. The provocative acts of the deceased were not capable of constituting provocation sufficient to reduce the charge of murder to culpable homicide not amounting to murder. Further, the brutal retaliation by the appellant was not proportionate to the provocation. We agree with the learned trial judge that a reasonable man placed in the situation and circumstances the appellant was placed would not have acted as the appellant did. (Emphasis added.)

In this regard, in *R v Duffy* [1949] 1 All ER 932, the appellant, who was convicted of the murder of her husband, had been subjected to brutal treatment by him. On the night of the offence, there had been quarrels and blows had been struck. The appellant had wished to take their child away and the husband had prevented her. The appellant left the room for a short while and changed her clothes. Eventually, when her husband was in bed, she returned with a hatchet and a hammer, with both of which she struck him. She pleaded the defence of provocation. The jury found her guilty of murder. The Court of Criminal Appeal dismissed her appeal. The following summing up by the learned trial judge to the jury was held by the Court of Criminal Appeal as impeccable:

A Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him for the moment not master of his mind. Let me distinguish for you some of the things which provocation in law is not. Circumstances which merely predispose to a violent act are not enough. *Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed, the further removed an incident is from the crime, the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here — the blame attaching to the dead man. You are not standing in judgment on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant. What matters is whether this girl had the time to say: 'Whatever I have suffered, whatever I have endured, I know that Thou shalt not kill.' That is what matters*. Similarly, as counsel for the prosecution has told you, circumstances which induce a desire for revenge, or *a sudden passion of anger, are not enough*. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self control which is of the essence of provocation … Provocation being, therefore, as I have defined it, there are two things, in considering it, to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, where there has been no time for reflection. *Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation — that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation*. (Emphasis added.)

Reverting to the instant appeal, in our view, whatever that Rozita had done and said from 9 June 2001 until 3 September 2001, and no matter how exasperating and humiliating they were, they did not cause the appellant to retaliate instantaneously in his house. From his own evidence, he did not appear to lose his power of self control. He appeared to have let her leave his house. Then he went into his room and took P8A. Then with P8A he proceeded to PW8's house. He said he brought P8A to cut wires in PW8's house. We cannot accept that as being true or capable of raising any reasonable doubt, because there is nothing to show that after taking P8A, he used it to cut any wire. Instead, the indisputable evidence show that with P8A he went to PW8's house and confronted Rozita. To us that is premeditation. In our judgment, even if Rozita provoked him in his house before the appellant confronted Rozita in PW8's house, there was sufficient cooling off period for passion to cool and for reason to regain control of the mind. Indeed, he had the

time to ask Rozita, 'abang pegang Ita pun tak boleh ke. Ita kan masih isteri abang'. Rozita did not answer. The next thing that happened was that Rozita's throat was cut and stabbed. The act of the appellant in causing injuries on Rozita's neck was not an act of a person who was deprived of the power of self control by grave and sudden provocation, but a premeditated act. Besides, even if all that Rozita said and done on 3 September 2001 amounted to provocation, the cutting of her throat was clearly out of proportion to the provocation received. The appellant therefore failed to establish the defence of provocation on the balance of probabilities. We therefore agree with the learned trial judge that the defence of grave and sudden provocation under Exception 1 to s 300 of the Penal Code was not made out.

SUDDEN FIGHT

[27] This defence was raised for the first time in this appeal. The test we have to apply in such a situation is whether there is sufficient evidence in this case upon which a reasonable tribunal could find the defence to be made out (*Public Prosecutor v Awang Raduan Awang Bol* [2005] 1 CLJ 649(FC)).

[28] Learned counsel's submission before us on this ground was simply this. Since in the first information report lodged in this case (exh P26) it was reported that, 'ada berlaku pergaduhan suami isteri di Parit Pecah, Parit Jawa seorang telah meninggal dunia dan seorang cedera', the offence committed was not murder but culpable homicide not amounting to murder. We do not find any merit in that submission. The defence of sudden fight is provided under Exception 4 to s 300 of the Penal Code as follows:

> Culpable homicide is not murder if it is committed without premeditation in a *sudden fight* in the heat of passion upon a sudden quarrel, *and without the offender having taken undue advantage or acted in a cruel or unusual manner* (see also *Public Prosecutor v Awang Raduan Awang Bol* [2005] 1 CLJ 649 (FC)). (Emphasis added.)

The information in P26 was given to PW4 by telephone by an unidentified member of the public. In P26, that member of the public did not say whether he witnessed the incident. He could have heard it from somebody else. That information was hearsay, or could even be hearsay upon hearsay. The important thing is that the truth of that information is not proven. The evidentiary value of P26 as a first information report is only to contradict the testimony of a witness under s 145 of the Evidence Act 1950 or to corroborate his testimony under s 157 of the same Act. It is not substantive evidence of its contents (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). However, as a first information, P26 had served its purpose of triggering the investigation by the police which led to the prosecution and eventually the conviction of the appellant in the court below. On the evidence available before the court, we find no evidence to establish a fight (let alone a

A sudden fight) between the appellant and Rozita. The evidence in this case which we have examined and discussed at length elsewhere in this judgment established that after Rozita left the appellant's house in the morning on 3 September 2001, the appellant had armed himself with P8A and then proceeded to PW8's house where she confronted Rozita (who was unarmed), B and fatally cut and stabbed her throat. So, even if there had been a fight and whatever that Rozita did prior to the attack on her as revealed by the evidence in this case, it is clear beyond reasonable doubt that the appellant had acted in a cruel or unusual manner.

C **[29]** The defence of sudden fight also failed.

CONCLUSION

D **[30]** We have carefully scrutinised the evidence on record in this case and examined the judgment of the learned judge with the greatest of care. We are entirely satisfied that the conviction of the appellant on the charge of murder is safe. In the result the appellant's appeal is dismissed. The conviction and the death sentence imposed on the appellant by the High Court are affirmed.

E *Appeal dismissed.*

Reported by Kanesh Sundrum

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